SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 356

JILLO BYNUM, ET AL.,

Petitioners,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY.

BRIEF IN SUPPORT OF PETITION.

This brief, in support of the petition for a writ of certiorari, seeks to reverse the judgment of the Court of Appeals, and Supreme Court of Tennessee, which held and decreed that the respondent's Firestone Auto Supply & Service Store herein involved was, as held and adjudged by the Chancellor of the Chancery Court of Shelby County, Tennessee, a *retail establishment* within Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 213 (a) (2)), although the undisputed evidence as presented by respondent's Exhibit #1, made a part of the record in this cause, shows that from October 24, 1938 through December 31, 1938, said store derived *39.1%* of its total income from wholesale business handled and transacted by it; for the year 1939 said store derived *34%* of its total income from wholesale business and in 1940 said store enjoyed an

income of *35.95%* of its total revenue from its wholesale business, and that in the usual, regular course of its business said store was engaged in making interstate sales and deliveries of goods, wares and merchandise which amounted to a substantial degree, as shown by respondent's evidence which was made a part of the record in this cause, Exhibit #5 (R. 150, 152).

The Tennessee Courts based their action upon the erroneous theory which had been promulgated by the Administrator of the Wage & Hour Division of the U. S. Dept. of Labor, as set out in its Bull. #6 (Retail and Service Establishments) of *December 1938*, and which theory the Administrator *repudiated* after the Decision in the case of *Wood* v. *Central Sand & Gravel*, (33 Fed. Supp. 40), and refused to follow the Federal courts' construction of Section 213 (a) (2) of the Statute herein involved; and, the plain language of said section refers solely to *retail or service* establishments and in nowise refers to nor mentions a *wholesale* or a combined *wholesale* and retail establishment.

Opinions of the Courts Not Reported.

The Opinions of the Courts of Tennessee in this cause have not, at this date, been officially reported. The Opinions of the Court of Appeals of Tennessee and that of the Chancery Court of Shelby County, Tennessee, were made a part of the certified transcript in this case and are found on pages 35 and 191 of the transcript. The Supreme Court of Tennessee rendered no opinion when it denied the petitioners petition for a writ of certiorari on May 15, 1943.

Statement of the Case.

Action was brought by petitioners, former employees of respondent, working out of and for one of its Firestone Auto Supply & Service Stores, which are the sole outlets for the disposal of the manufactured commodities of re-

spondent, to recover benefits under the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201 et seq.), alleging that because of their activities performed as employees aforesaid they were under the protection of said Act and entitled to the remedies provided therein. Denial of the propositions advanced by petitioners was made by respondent and it affirmatively plead Section 213 (a) (2) of said Act which exempts from the provisions of Sections 206-207 the employees of a business which is a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.

The Courts of Tennessee held that the petitioners were engaged in interstate activities under said Act; the Trial Court specifically so holding, the Court of Appeals pretermitting this issue, made by the respondent's assignments of errors in that Court and the Supreme Court in denying the respondent's petition for certiorari, in which Court respondent had filed its assignments of errors raising said issue.

The Courts of Tennessee held that the respondent's store herein involved was a *retail establishment* under Section 213 (a) (2) of said Federal Statute (R. 34, 195).

The Supreme Court of Tennessee, which is the highest court in the State of Tennessee in which a decision could be had rendered a final judgment in this cause when it denied petitioners' petition for writ of certiorari on May 15, 1943 (R. 222).

A more detailed statement is made in the petition for writ of certiorari, *supra,* page —— and reference is made thereto, in the interest of brevity and to avoid repetition.

Jurisdiction of This Court.

Jurisdiction of this Court is based on Sec. 237 of the Judicial Code, as amended by the Act of Feb. 13, 1925, Ch. 299, Sec. I, 43 Stat. 937, and by Act of Jan. 31, 1928, Ch. 14,

Sec. I, 45 Stat. 54, 28 U. S. C. A. 344; (*Pittman* v. *Home Owners Loan Corp.* 308 U. S. 21), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of various states where "a title, right, privilege, or immunity is set forth and claimed under a statute of the United States."

Assignment of Error.

The Court of Appeals and the Supreme Court of Tennessee erred in holding and adjudging that the respondent's Firestone Auto Supply & Service Store involved in this cause was a *retail establishment* under Section 213 (a) (2) of the Federal Statute, an Act of Congress, the Fair Labor Standards Act of 1938, (29 U. S. C. A., Section 213 (a) (2)), as the *undisputed evidence introduced by respondent* as shown in its Exhibit #1, which Exhibit was made a part of the record in this cause, disclosed that the said store from October 24, 1938 through December 31, 1938, obtained *39.1%* of its total income from its *wholesale* business, in 1939 said store obtained *34%* of its total income from its *wholesale* business and for the year 1940 said store obtained *35.95%* of its total income from its *wholesale* business and that a substantial part of the business of said store was in interstate commerce (exhibit #5); and, that respondent's undisputed evidence shows that in July 1939, which month was picked at random as indicating the usual, regular and average number of wholesale transactions and retail transactions handled by said store, *25.2%* of the total number of transactions handled by said store were of a wholesale character. (Exhibit #7) (R. 150, 152, 153).

Summary of Argument.

This action involves the interpretation and application of Section 213 (a) (2) of the Federal Statute, the Fair Labor

Standards Act of 1938 (U. S. C. A., Sections 201 et seq. — 213 (a) (2)), which is as follows:

> "Sec. 213 (a) The provisions of sections 206 and 207 shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce, * * *"

Was Federal Question Properly Raised?

This action is predicated solely upon the right, privilege and title provided by the Federal Statute, The Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201 et seq.) to employees engaged in interstate commerce and in the production of goods for interstate commerce whose employers failed to compensate them under Sections 206-207 of said Statute.

In the Trial Court.

The petitioners filed this action alleging that they were engaged in interstate activities within the meaning of said Statute and that they were due minimum wages, overtime compensation and other benefits for work performed for respondent. To the action of the petitioners respondent filed its denial and affirmatively plead for defense provided by Section 213 (a) (2) of said Act (R. 1, 12, 5, 22).

The federal question here presented: Whether respondent's store involved herein was a *retail establishment* under Section 213 (a) (2) was properly raised by the pleadings filed in the Chancery Court of Shelby County, Tennessee, by the petitioners and the respondent. The Chancellor adjudged that the respondent's said store was a retail establishment under Sec. 213 (a) (2) of said Act, though the evidence introduced by respondent proved that said store was engaged in a substantial, combined retail *and whole-*

sale establishment, a part of which business was in interstate commerce (R. 34, 150, 152).

In the Court of Appeals.

This federal question here presented and with which petitioners are concerned was preserved and raised by petitioners' assignments of errors filed in that Court (R. 189 et seq.). The Court of Appeals in passing upon the issue of whether respondent's said store was a retail establishment under Section 213 (a) (2) of said Act, held that this issue was determinative of the lawsuit and adjudged and decreed said store a retail establishment under said Section 213 (a) (2) (R. 195).

In the Supreme Court of Tennessee.

Petitioners preserved the federal question here presented, whether respondent's said store was a *retail* establishment under Section 213 (a) (2), by their assignments of errors made in that Court (R. 218 et seq.). The Supreme Court of Tennessee, in which petitioners had filed petition for writ of certiorari, along with their assignments of errors, on May 15, 1943, denied the petition (R. 222).

EVIDENCE IS NOT CONFLICTING.

This federal question, the scope of Section 213 (a) (2) of the Fair Labor Standards Act of 1938, and whether same is applicable to the respondent in the conduct and operation of its Firestone Auto Supply & Service Store involved in this cause, is presented to this Court on the *undisputed* evidence as introduced by and made a part of the record in this cause by the respondent.

This Court, *the Supreme Court of the United States, can and will perform its proper functions and protect the fed-*

eral rights of the petitioners under the Fair Labor Standards Act of 1938.

Norris v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579;
Medrich v. *Lowenstein,* 232 U. S. 236;
Toledo, etc., R. Co. v. *Slavin,* 236 U. S. 545;
Stoll v. *Gottlieb,* 305 U. S. 165;
Nickey v. *Miss.,* 292 U. S. 393;
Hayne v. *Committee,* 307 U. S. 496.

Retail and Wholesale Business of Respondent's Store.

The exemption provided by Section 213 (a) (2) of the Fair Labor Standards Act of 1938, does not by its terms extend to a *wholesale establishment* nor to a retail *and wholesale establishment* combination. The exemption is restricted in terms to a *retail establishment* alone.

In the case of *Wood* v. *Central Sand & Gravel,* 33 Fed. Supp. 40, the Court held that a company selling its goods in large orders or quantities, and at a discount from the regular retail price, and engaging in this type of business to a substantial degree, could not be considered a *retail establishment* under Section 213 (a) (2) aforesaid. It is to be recalled that in the *Wood* case, the goods were sold in large quantities, at a discount and not for resale but sold for consumption by the various purchasers. The fact that the goods were to be consumed was of no consideration in the determination of the character of the transaction. The Court held that if a company engaged in a *substantial* wholesale business, the exemption of Section 213 (a) (2) could not be successfully invoked by it.

The courts of Tennessee, in the case at bar, refused to follow the interpretation of Section 213 (a) (2) as determined by the federal court in the *Wood* case, *supra,* and as established and further announced in the case of *Lewis* v. *Nailling,* 3 Labor Cases 60078.

The Tennessee courts undertook to, and did base their decision in this cause, upon a certain ruling of the Administrator of the Wage & Hour Division made in connection with that officer's Bull. #6 (Retail & Service Establishments) issued *December 1938*, by which the Administrator ruled that a *50%* engagement in *wholesale* activities and *50%* in *retail* business would bring a company or person within the provision of Section 213 (a) (2). Following the ruling in the *Wood* v. *Central Sand & Gravel* case, *supra*, which adopted the *substantial* test in determining the application of Section 213 (a) (2), the Administrator *repudiated* its 50-50% theory, and adopted a *75% retail* and *25% wholesale* as being the test of the applicability of said section. (Bull. #6—Retail & Service Establishments, Revised, of *June, 1941*) (R. 160).

At the time that this cause was tried before the lower court, in *January 1942*, the decisions in the *Wood* case, *supra*, and in *Lewis* v. *Nailling, supra*, had been announced and published, and the Administrator had repudiated its 50-50% theory, and had announced its *75%-25%* theory and issued its Revised Bull. #6 of *June 1941*.

Yet, while the evidence, *undisputed* and *introduced and made a part of the record in this cause by the respondent, established and proved*, that the respondent's store herein involved *was not* entitled to the application and exemption of Section 213 (a) (2) under the decisions in the *Wood* case and even under the *75% retail* and *25% wholesale* theory advanced by the Administrator of the Wage & Hour Division in June 1941, the Courts of Tennessee, deny to these petitioners the right to recover benefits under this salutary Fair Labor Standards Act by applying to the respondent's said store the exemption, as determined *and repudiated* by the Administrator, of a 50-50% engagement in the two types of business.

Thus we have the Courts of Tennessee adopting an erroneous ruling, made by the Administrator and which the Administrator *repudiated* before the trial of this action.

The Administrator is not empowered by the Act to extend or restrict the application of Section 213 (a) (2), nor to make a legally binding interpretation of said Section. The administrator so states in the second paragraph of his Bull. #6 of June 1941 and the Courts have so held. *Walling* v. *American Stores*, 6 Labor Cases, 61449. The Tennessee Court, in this cause, refused to follow the authoritative and judicial interpretation given to said section by the federal courts.

Exhibit #1 (R. 150).

Respondent's witness-auditor testified that in making up Exhibit #1 (Schedule "A"), he placed in the category of "Commercial, Industrial, Governmental and Farm-Non-Retail Sales" those sales which during a *six* months period (6-months periods being suggested by the Administrator in its Bull. #6 of June 1941, Revised, and found in 2 Commerce Clearing House, Par. 32, 106, page 32,225 and which was made Exhibit #9 to the record by the respondent) added to seven passenger tires or ten truck tires, *sold at less than the going or retail price* (R. 100-101, 114, 120). Sales made to dealers for resale were shown as "Sales to Dealers" (R. 104).

Included in "Commercial, Industrial, Governmental and Farm-Non-Retail Sales", on this Exhibit, were *tank wagon sales* of gasoline which during a 6-months period amounted to 1500 gallons or over, *sold at less than the retail price* (R. 101). (These Tank wagon sales of gasoline were sold by the respondent's said store but delivered by an employee of another Firestone Auto Supply & Service Store) (R. 138, 187, 188). All the gasoline sold in tank wagon lots, at less than the retail price, and gasoline sold from the pumps on the premises of the said store, at less than the retail price,

in bulk and on charge accounts by filling up daily, or as needed, the trucks of its customers, and sold at a discount from the retail price, which did not amount to 1500 gallons during a six-months period, but which might amount to 1499 gallons or less, were not included in the category of "Commercial, Industrial, Governmental and Farm Non-Retail Sales", but were thrown into the general consumers sales (R. 138, 187, 188, 60-61, 78).

Another classification shown on Exhibit #1 is "Sales Value of Accommodation Deliveries". These sales were on contracts with National Organizations, made directly by the respondent, in Ohio, but shipped interstate to the customers by the respondent's said store out of said store's stock, and, included in this category were shipments of goods made by the said store to patrons of other Firestone Auto Supply & Service stores located outside of Tennessee. The merchandise so drawn from the stock of the said store was replaced in said store by the District Office of the respondent. For handling these "Accommodation Deliveries", the said store received a "commission", in place of the "sales credit" which it obtained when it directly made a sale (R. 96, 121).

With reference to the above-described Exhibit #1, the Chancellor held that from Oct. 24, 1938 and up to and including September 22, 1940, (the last date involved in this lawsuit,) and further up to December 31, 1940, from 60.9% to 71.3% of the total sales made by the defendant establishment, * * * were retail sales within the purview of the rulings of the Administrator of the Wage & Hour Division * * * as reflected by Exhibits 8 and 9, and, that therefore, more than *51%* of the sales of said store were retail sales within the rulings and Interpretative Bulletin of the Wage & Hour Division (R. 37, 43, 33).

The Exhibit #9 referred to was Bull. #6 of June 1941, wherein the Administrator set up its 75% retail and 25%

wholesale as the test of applying Section 213 (a) (2). Exhibit #8 was a letter from the Administrator to respondent wherein certain questions regarding sales which were described so as to come under the definition of "retail" transactions were answered by the Administrator. Said letter, Exhibit #8 will be found in the transcript, page 156.

It is to be noted that while the respondent testified that it compiled its Exhibits by the rules set out in the Bull. #6 of June 1941, that the Court ignores the percentages as set up therein by the Administrator and adopts the percentages as had been set up by the Administrator in its former Bull. #6 of Dec. *1938*, except for the first 6-months period of 1939 shown on Exhibit #1 (R. 33, 34, 160 et seq.).

In presenting this cause, petitioners accept without dispute the data shown on this Exhibit #1, though this analysis does not, in a consideration of the meaning of "retail" and, "wholesale", as construed by judicial interpretation, include a complete and full record of the business conducted by respondent's said store in the two types of transactions.

As undisputed evidence, therefore, respondent's Exhibit #1 shows that its said store earned from Oct. 24, 1938 through December 31, 1938, *39.1%* of its receipts from *wholesale* business, in the year 1939, it earned from this source of business *34%* of its total income and in the year 1940, it derived *35.95%* of its total income from *wholesale* business (R. 150).

Exhibit #2 (Schedule "D") (R. 151, 114).

Respondent's witness-auditor testified that in preparing Exhibit #2 he placed sales made to dealers in that classification and all other sales, regardless of volume, price or anything else, in the classification of retail sales; that the only distinction which he observed was in goods which

were sold for resale and that sold for consumption. (R. 151, 105).

In this Exhibit #2 all those sales in large quantities, at a discount from the retail price, made of tires and other merchandise, running up into the thousands of dollars, were shown as retail sales because the business, industrial and governmental organizations purchasing them used them in their various activities (R. 105, 136-137).

Likewise, all sales of gasoline, even including those of 1500 gallons per 6-months periods, and sold at a discount from the retail price were considered as retail sales on this Exhibit #2 except for the dealer, Walter Hunter. And sales of gasoline, sold at a discount from the retail price constituted the manner in which the larger portion of this product was sold (R. 138, 187, 188).

In a comparison of this Exhibit #2 with Exhibit #1, considering the "Commercial, Industrial and Farm Non-Retail Sales," the income from merchandise sold for consumption to commercial, industrial and such organizations, in large volume and at a discount from the retail price, constituted a substantial portion of the said store's business. (R. 150, 151).

In this connection it is to be recalled that in the case of *Wood* v. *Central Sand & Gravel*, 33 Fed. Supp. 40, *supra*, that the City of Memphis, the W. P. A., the contractors, etc., were not sold materials by the defendants in that case, for resale, but for consumption in their activities.

Even considering this Exhibit #2 and the data thereon shown of *sales made for resale*, or *non-retail sales*, said store from this source from Oct. 24, 1938 through December 31, 1938, earned *20.3%* of its total income, for the year 1939, *20.4%* of its total income was from this type of business and in the year 1940 said store earned 22.1% of its income from sales made to dealers for resale, which percentages are all substantial under the holding of the Court

in the *Wood* case *supra*. The percentages just mentioned show that over one-fifth of the income of the said store was from sales made for resale, which are strictly and technically *wholesale* transactions. In the *Wood* case, further, there were no strictly technical *wholesale* sales but sales made by the defendants were in large quantities and at a discount from the retail price to the large consumers of its materials. The income derived from sales to dealers, without consideration even of the *wholesale* sales made for consumption, is substantial to the extent that Section 213 (a) (2) cannot be successfully invoked by the respondent in this case.

Had respondent's said store been dealing in the wholesale business alone which it transacted and which was substantial, and doing part of its business in interstate commerce, as shown on Exhibit #5 to the record, its employees would have been under the protection of the Act and the exemption in Section 213 (a) (2) would not have been of the least consideration in relation to its business.

Following in analogy the thought of the *U. S. Circuit Court of Appeals, Third Circuit, in Walling* v. *American Stores Company, 6 Labor Cases, 61449:* Is the respondent in this cause exempt from the obligations imposed by the Fair Labor Standards Act in Sections 206-207 thereof, because in connection with, and as an unsegregated part of, the business carried on by its said store it is engaged not only in a substantial retail capacity but substantially engaged in the business of a wholesaler, whereas, if it conducted only its wholesale business it would be required to pay its employees under the requirements of said Act?

It is interesting to note that after the Fair Labor Standards Act was enacted many attempts to grant total exemptions to employers engaged in wholesale businesses were made. They all failed. See note to *Walling* v. *American Stores Co.*, 6 Lab. Cas. 61449. Congress intended that only

a retail establishment, and not a retail *and wholesale* establishment, indiscriminately carrying on its business in the two types of sales, should be exempt under Section 213 (a) (2), and the employees of such employers not be denied their proper rights to pay under the Act.

Lest there be any confusion in looking to the stores of the American Stores Co., in *Walling* v. *that defendant,* in 6 Lab. Cases 61449, *and the store here in question, the units* in the *American Stores* case all sold strictly at one price to all, at strictly retail, and made no sales in large quantities and at discounts and they were not in anywise engaged in making sales in interstate commerce. This was not the case, as shown by the record, of the store in this action.

The case at bar is on all fours with the case of *Fleming* v. *Stillman,* 6 Labor Cases, 61566, U. S. District Court of Tennessee.

Both Exhibits #1, based on the quantity-price test set up by the Administrator of the Wage & Hour Division, and Exhibit #2, based upon the distinction of sales made for resale and sales made for consumption, establish that respondent's said store was substantially engaged in *wholesaling,* conducting a combined and unsegregated retail *and wholesale* business, and that a substantial part of its business was in interstate commerce; that apart from its *wholesaling* activities in making sales in large quantities and at discounts to organizations consuming its products in their various activities, said store derived from its sales made to dealers for resale a substantial part of its regular business.

In *Wood* v. *Central Sand & Gravel,* 33 Fed. Supp. 40 and in *Lewis* v. *Nailling,* 3 Lab. Cas. 60078, the test was whether a *substantial* part of the defendants' business was wholesale. In the *Wood* case, the substantial part in percentage is not shown; in the *Lewis* case it was 40%, which

40% is less than the 50% theory which had been advanced by the Administrator in 1938.

In the cause before the Court now, the respondent in and through its activities in the selling and servicing which it handled through its said store, certainly, under the decision of the Court in the foregoing cases, was substantially engaged in *wholesaling*. The Court of Appeals of Tennessee and the Supreme Court of Tennessee were in error in holding that Section 213 (a) (2) of this salutary and humane Federal Statute was applicable to the respondent's store herein.

Said Store Not Engaged in Manufacturing.

Respondent, and the Tennessee Courts, from the expression in the Opinions, make much ado about the fact that said store was not engaged in manufacturing. Manufacturing is not commerce. The shipping, transmitting, selling of goods in interstate commerce is commerce. (*U. S. v. Darby,* 213 U. S. 100). This action is not predicated upon any premises that the unit store herein was engaged in the manufacturing or production of goods, but based upon the fact that said store was engaged in selling, and at wholesale and retail, in interstate commerce and intrastate commerce.

Congress intended that merchants who were engaged in selling and servicing, were not to be exempt from the obligations of the Act if they were to a substantial degree engaged in selling in wholesale transactions and in interstate commerce. And, Congress, then apart from the Sections applying to those engaged in manufacturing, by Section 213 (a) (2) sought to bring into the purview of the duties imposed by this Act those whose goods would burden interstate commerce, because they sell and transport in the channels of interstate commerce.

There is nothing to the contention of the respondent nor to the expression of the Courts on this phase of the matter.

Interstate Activities of Said Store.

The position of the petitioners is that the application of Section 213 (a) (2) of the Fair Labor Standards Act is limited to retailers and that wholesalers do not come within this exemption *under any circumstances. Craft* v. *Fish*, 6 Lab. Cas. 61262; *Fleming* v. *Stillman*, 6 Lab. Cas. 61566.

If the exemption provided by said section is not applicable to said store, as failing to meet the requirements of a "retail" establishment thereunder, then if *any substantial* part of the business conducted by said store be in interstate commerce, sections 206-207 are applicable to petitioners and other employees of said store. *Craft* v. *Fish, supra.*

Respondent's Exhibit #5 (R. 152) shows that it directly sold during the period involved herein $17,013 of its goods in interstate commerce, or *2.2%*. It is to be noted that in compiling Exhibits #1 and #2, data is shown thereon up to and including December 31, 1940, whereas in this Exhibit #5, the interstate business done by said store is shown only through September 20, 1940, said date being the last day involved actually in this case. What was the amount of interstate business done by this store from Sept. 20, 1940 through Dec. 31, 1940? This is not shown.

Further, on this Ex. #5, the percentage of interstate business handled by said store in transmitting the "Sales Value of Deliveries", which amounted to $29,797 (exhibits #1 and #2) is not shown in full. The auditor-witness testified (R. 111, 112, 117), that he separated the "Sales Value of Accommodation" etc., into the intrastate transactions and interstate transactions, which resulted in an interstate business amounting to *3.3%*, as shown on the Exhibit #5.

However, these transactions were all interstate in character as they represent the value of goods shipped by the said store on orders which all emanated from outside the State of Tennessee, being either the orders on "National" accounts, contracts made by respondent with national organizations at its home office in Ohio, or orders from some other Firestone Auto Supply & Service Store outside of Tennessee and all of which goods came out of the commingled mass of merchandise of the said store (R. 50, 51, 60, 62, 63, 68, 91, 96, 112, 117, Ex. p. 152).

Sec. 2 of the Fair Labor Standards Act;
Currin v. *Wallace,* 206 U. S. 1;
Hamlet Ice Co., v. *Fleming,* 5 Lab. Cas. 61019.

If the "Sales Value of Accommodation Deliveries", totaling $29,797 be fully considered, as they were, interstate transactions, then there was 4.4% of the said stores' business in interstate commerce from this source, which together with the 2.2% admitted by the respondent to represent sales made by it directly in interstate commerce, amounts to an interstate participation of *6.6%*. And, this degree of participation in interstate commerce by said store, without consideration to the sales of merchandise and gasoline made by said store in the city of Memphis, which became a part of interstate commerce, which was sold to be transported in interstate commerce and used in the furtherance of interstate commerce, through its sales of goods to firms, agencies and industries engaged in interstate commerce and in the production of goods for interstate commerce (R. 60-62, 63, 66-67, 71, 77, 78, 87, 51, 54, 56-57, 138, 187, 188).

Nevertheless, the 2.2% interstate, or the 3.3% interstate, which is admitted absolutely by the respondent as representing interstate business conducted by its said store, is

sufficient to bring the said store within the purview of the Act.

Lewis v. *Nailling*, 3 Lab. Cas. 60078;
U. S. v. *Darby*, 3 L. C. 51, 108;
Muldowney v. *Seaberg*, 4 L. C. 60517.

Features of said Store's Business.

1.

The respondent's said store sold indiscriminately at wholesale and retail. It was out to get the business, The Trial Court, observed (R. 41):

> "And I suppose, although I am just supposing, that the purpose in having these retail stores is to more or less put Firestone Tires on the retail market in competition with the tires of others who are being sold at retail, so as to see that Firestone gets its share of the sale of tires, *regardless of how it is done, whether wholesale or retail.*"

The record shows that the said store was competing not only with others selling other brands of goods similar to that manufactured by respondent and sold by said store, but even underselling its own dealers, in selling goods in large quantities, at large discounts, in cases as much as a 45% discount, and at less than the price at which the dealers who bought from it could buy (R. 61, 63, 76, 91, 143). This is exactly the kind of competition that is aimed at by the Fair Labor Standards Act, as this competition entered into the interstate business of the said store.

2.

The wholesale and retail, the interstate and intrastate business of the said store was handled in unison and without segregation of any kind. Its stock was one commingled mass, from which was drawn the merchandise to fill the

orders and sales in the various types of business. The business was all under one roof, in one building, having no physical separation between its wholesale and retail business, its interstate and intrastate business; the service of its employees was utilized indiscriminately in and on its intrastate, interstate, retail and wholesale business. The business was conducted as an entity. *Wood* v. *Central Sand & Gravel,* 33 Fed. Sup. 40.

Petitioners worked on all phases of the respondent's said store's business each and every week (R. 52, 54, 62, 63, 68, 58, 92).

The rulings of the Administrator are not legally binding, but they are entitled to weight. *U. S.* v. *American Trucking Company.* Regarding the business of the said store, the Administrator in Section 41 of its Bull. #6 of June 1941, Revised, says:

> "An establishment may not be considered a *retail* establishment if a substantial portion of its selling is non-retail. In such cases the business, viewed as a *single establishment is not retail for the purpose of Section 213 (a) (2).* The exemption, however, may apply to the *retail portion* of the business *if adequately segregated* from the remainder."

In the case at bar, as in the case of *Wood* v. *Central Sand & Gravel* and *Lewis* v. *Nailling,* there was no separation between the retail and wholesale business of the said store.

3.

On the business such as conducted by the said store the Administrator has specifically spoken, in its Section 70 of Bull. #6 of June 1941:

> "Some tire and accessory dealers, however, *sell both at retail and non-retail.* Such establishments will not be considered retail establishments, if the *non-retail selling constitutes a substantial* portion of the total selling

> of the establishment. The non-retail sales include (1) sales to dealers, garages, mechanics, etc. for purpose of resale, (2) sales to business or industrial purchasers in quantities materially in excess of the quantities normally purchased by individual purchasers and at a special discount from the regular retail price, and (3) sales of the type of goods, such as heavy truck or bus tires, not purchased by the general consuming public."

The said store engaged in all three types of business set out in the foregoing section (R. 50, 54, 56, 57, 58, 60-63, 65-72, 76-81, 87, 91, 92, 94, 143, 146, 148 and Exhibits #1, 5 and 7, p. 150, 152, 153).

4.

Not only sales of goods were made to large consumers at great discounts from the regular retail price, but even "sales" of service to those organizations which utilized the services tendered by said store in servicing their trucks, trailers, tractors, automobiles, and in mounting and changing the tires thereon, were made at less than the retail price (R. 135, 148).

5.

Each item carried by said store was listed in salesbooks supplied to all its employees, except the Negroes working for said store; and said salesbooks listed three separate and distinct prices for each article handled by said store, to-wit, dealers, commercial and consumers. As stated by the Court, in *Fleming* v. *Stillman*, 6 Lab. Cas. 61566 (R. 62, 75, 87, 91).

> "* * * gentlemen, that is not the usual manner in which a retail business is conducted and that is their fixed policy in the sale of parts."

6.

Two separate types of billing statements were employed by said store, dealers and consumers, the commercial sales

being written up on the dealers' billing. And, those sales made at even less than dealers' prices were written up on the dealers' billing (R. 61, 74, 76, 77).

7.

Said store distributed catalogs containing a list and cuts of the multitude of products handled by it, and which carried the retail *and wholesale* prices on each of the articles 78, 91, 92).

8.

Excepting for the colored help, all employees of the said store were required to solicit orders and to sell merchandise handled by it. All the employees of said store were assigned monthly *quotas* which they were required to sell. The progress of each man's sales was shown *daily*, charts showing the total current sales to the date shown on the chart, together with data on the various types of business handled by said store, being posted in a regular place in said store. All the employees were required to attend the sales meetings, district meetings and conferences of the Southern District, all matters which were together with the quotas of sales assigned to the employees under the supervision of the District Sales Manager of the Firestone Tire & Rubber Company's Southern Division (R. 61, 63, 73, 75-76, 78, 84-85, 86, 95).

9.

Said store had in its employ three *commercial salesmen*, sometimes four. These salesmen did no work on the floor of the said store but solicited business from dealers and large consumers, interstate and intrastate (R. 61, 63, 68, 78, 91, 92.)

10.

Respondent's said store occupied one-fourth of a city block and employed about thirty persons, including six

regular, sometimes seven, colored employees. Of the six, sometimes seven, colored employees, only the petitioners were assigned and drove trucks during the time they were employed by respondent and attended to business away from the premises of said store (R. 52, 54, 58, 62, 63, 68, 92).

11.

Petitioners each worked twelve hours each day during every workweek they were employed by respondent and had no time off for lunch. In addition, each of the petitioners worked 12 hours every other Sunday (R. 32, 43-44, 49, 53, 54, 55, 62, 65, 86). Each of the petitioners was paid $50 per month by respondent (R. 29).

Petitioner Jillo Bynum was employed from October 24, 1938 to October 24, 1939, Lonnie Lewis from October 23, 1938 to April 30, 1939 and Robert Mullins from June 26, 1939 to September 22, 1940 (R. 28, 29).

OPINION OF THE COURT OF APPEALS.

The Opinion of the Court of Appeals is so devoid of facts as shown by the record and so confused on other facts as shown by the testimony in this cause, that it is not essential that we discuss same to any length (R. 191 et seq.). For instance, the Court refers to the said store being a "typical automobile service station" selling merchandise typically found in such a place. The question here is not the typical goods sold by the said store but the type of sales which it made of such goods. Had the said store sold its goods to all at a retail price then the business would have been exempt under Section 213 (a) (2). Again, the Court refers to "three customers" to whom the said store sold gasoline for resale. The number of dealers to whom the said store sold goods, and gasoline, for resale is not shown but Exhibit #7 reflects that over 25% of the transactions were *wholesale* (R. 106, 107, 153). The "three customers" to whom the

Court had reference were the three patrons shown on Exhibit #10, record 187, to whom gasoline up to and over 1500 gallons per 6-months period was sold, and at a discount. And, only one of these was considered by the respondent as a "dealer" and the other two as "consumer" sales because they used the gasoline in their business (R. 138, 188). Again, the Court practically ignores the substantial, and extensive business, engaged in by the said store in technical wholesale sales and sales made to consumers in wholesale transactions. All of which matters are shown on Exhibits #1 and #2 to the record, pages 150, 151. The court refers to *seven* employees of the said store. There were 30 employees of said store, *seven colored men* (R. 62, 64, 68, 92).

This Court is not bound by findings of the State Courts and will make its own findings from the evidence in the record.

Conclusion.

The Fair Labor Standards Act should be liberally construed. The exemptions contained in the provisions of the said Act must be strictly construed.

Under a correct interpretation of Section 213 (a) (2) and a strict construction being given to said section, the respondent's said store is not the *retail establishment* contemplated by this Section. The Court of Appeals of Tennessee and the Supreme Court of Tennessee erred in applying said section to respondent's store herein involved and granting exemption from the obligations contained in sections 206-207 of this federal statute. The Courts of Tennessee should be reversed in their holding on this issue and judgment entered in favor of the petitioners for the amounts and equities due them, shown in the appendix hereto.

With the utmost confidence *"that what Congress has given as bread this Court will not convert into stone"*,

(*Great Northern Ry.* v. *Local Great Falls Lodge*, 283 Fed. Rep. 557), we most respectfully submit to Your Honors clients' rights in the foregoing petition and brief.

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